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Federalism, The Judiciary, and Constitutional Adjudication In Argentina: A Comparison with the U.S. Constitutional Model

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ARTICLES

FEDERALISM, THE JUDICIARY, AND CONSTITUTIONAL ADJUDICATION IN ARGENTINA: A COMPARISON WITH THE U.S. CONSTITUTIONAL MODEL

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I. INTRODUCTION

John Pendleton, the United States representative to the Argentine Confederation, described the Argentine Constitution of 1853 as an "almost exact copy of the Constitution of the United States."¹ Pendleton's conclusion, albeit exaggerated, demonstrates how significantly the U.S. Constitution influenced the basic framework of the Argentine Constitution.² Despite the many textual similarities between the two constitutions, however, the Argentine Supreme Court has not always interpreted those provisions in accordance with United States Supreme Court interpretations.

This Article will examine the influence of the United States constitutional jurisprudence over the Argentine judiciary. The Article is divided into two general parts. The first part will explore the structure of the Argentine federal judicial system as estab-

1. Petracchi, *Control Judicial en la Argentina*, 1987-E L.L. 709 (1987); R. FITZGIBBON, *ARGENTINA: A CHRONOLOGY AND FACT BOOK* 10 (1974); *contra* Quintana, *Comparison of the Constitutional Basis of the United States and Argentine Political Systems*, 97 U. PA. L. REV. 641 (1949).

2. Many of the similarities between the Argentine Constitution and the U.S. Constitution came about through the influence of Buenos Aires, the largest and wealthiest state. When the initial Argentine Constitution was approved by a National Convention in 1853, the province of Buenos Aires had not yet become a part of the federation created by the Constitution because of competing economic and political interests. See Criscenti, *Argentine Confederation*, in *ENCYCLOPEDIA OF LATIN AMERICA AND THE CARIBBEAN* 38 (1974); T. WEIL, *AREA HANDBOOK FOR ARGENTINE* 17-18 (2d ed. 1974). After several years of political disputes and a civil war, however, Buenos Aires agreed to join the confederation. Early, *Argentina, Paraguay and Uruguay*, in *THE CAMBRIDGE ENCYCLOPEDIA OF LATIN AMERICA AND THE CARIBBEAN* 253 (1985). As a predicate to membership, Buenos Aires required the provincial Constitutional Convention to reexamine the Constitution of 1853. F. KIRKPATRICK, *A HISTORY OF THE ARGENTINE REPUBLIC* 168 (1931); R. FITZGIBBON, *supra* note 1, at 10-11. Many of the provincial Convention's amendments, notably inspired by the U.S. Constitution, were adopted by the National Convention in 1860. *CONSTITUCIÓN ARGENTINA* (1853) [hereinafter *ARGEN. CONST.*]. Due to the significance of those amendments, the Argentine Constitution is commonly referred to as the 1853-1860 Constitution.

The Argentine Constitution is divided into two parts which are preceded by a preamble. The first part contains the Argentine Bill of Rights. The second part is subdivided into two titles. Title I covers the federal government and Title II covers the provincial governments.

lished by the Judiciary Act of 1863.³ This section focuses on the general aspects of federal subject matter jurisdiction. Second, the Article will analyze the precedential value of Argentine Supreme Court decisions. This issue presents a real and peculiar problem in Argentine constitutional jurisprudence, a jurisprudence influenced by the U.S. constitutional model and Argentina's civil law tradition.

II. THE STRUCTURE OF THE FEDERAL JUDICIAL SYSTEM

A. *Legislative and Judicial Power*

The Constitution of Argentina fuses the Spanish colonial structure, typified by the centralization of power, with the U.S. federal system. As a result of this blend, a complex framework of legislative and judicial jurisdiction has emerged. Nonetheless, as in the United States, Argentina has both federal and provincial court systems.⁴

The most notable difference between the Argentine and the U.S. constitutional systems results from article 67(11) of the Argentine Constitution. This provision expressly authorizes the Argentine Congress to enact national civil, commercial, penal, mining, and labor codes.⁵ If the Argentine Congress enacts a code, the provinces are barred from regulating matters covered by the code.⁶ The U.S. Congress, on the other hand, does not have this broad legislative power. In order to legislate with respect to matters traditionally reserved to the states, it must do so pursuant to some regulated power like the Commerce Clause,⁷ or the taxing or spending powers.⁸ Therefore, with regard to intrastate activities, it

3. 48 *Leyes Nacionales* [L.N.] (1863) (Argen.). The author uses the designation "Law No" in the text to refer to provisions found in the *Leyes Nacionales*.

4. T. WEIL, *supra* note 2, at 189.

5. "The Argentine Congress has the power to enact civil, commercial, penal, mining, labor, and social security codes, such codes not to alter local jurisdiction, their execution belonging to the federal or provincial courts, depending on which jurisdiction the person or things come under." ARGEN. CONST. art. 67(11).

6. ARGEN. CONST. arts. 108 and 310.

7. U.S. CONST. art. I, § 8.

8. *Id.*; see *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (upholding the minimum-wage and overtime provisions of the Fair Labor Standards Act of 1938, as amended in 1974, extending its coverage to state and local government employees); *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding the Agricultural Adjustment Act of 1938, as amended in 1940); *United States v. Darby*, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act of 1938); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (uphold-

must enact legislation in a piecemeal fashion, embracing only certain aspects of the law.⁹ As a result, the Argentine codes have a much broader role than U.S. legislation enacted by virtue of some regulated power.¹⁰

Before it was amended in 1860, article 67(11) completely deprived provincial courts of jurisdiction over cases involving the interpretation and application of the codes.¹¹ Under the amended version of article 67(11), the Argentine Congress retains the power to enact the codes and the federal and provincial courts are given subject matter jurisdiction over the codes.¹² Under article 108 of the Argentine Constitution, the provinces are prohibited from exercising the power delegated to the federal government.¹³ Therefore, the provinces may not enact civil, commercial, penal, and mining codes once the Argentine Congress has enacted them. Regarding jurisdiction, article 15 of Law No 48 deprives the Argentine Supreme Court of appellate jurisdiction over code interpretations of the highest provincial courts.¹⁴

Article 100 of the Argentine Constitution provides for federal court jurisdiction in all cases involving matters governed by the

ing the National Labor Relations Act of 1935). See also G. GUNTHER, CONSTITUTIONAL LAW 99-191 (11th ed. 1985).

9. *Id.*

10. Article 67(12) of the Argentine Constitution is almost identical to article I, § 8(3) of the U.S. Constitution. Regarding intrastate activity, the Argentine Congress is empowered to enact protective laws and to grant temporary concessions, privileges, and awards in order to provide for: 1) whatever is conducive to the prosperity of the country; 2) the progress and welfare of all the provinces; 3) the advancement of learning; 4) the curricula for general and university education; 5) the promotion of industry; 6) immigration; 7) the construction of railways and navigable canals; 8) the settlement of government-owned lands; 9) the establishment of new industries; 10) the importation of foreign capital; and 11) the exploration of the interior rivers. ARGEN. CONST. art. 67(16). The difference between the U.S. and Argentine constitutional systems may be attributed to different historical experiences. Colonial Argentina under Spanish rule, known as the Viceroyalty of Río de La Plata, was governed by a centralized Spanish structure concentrated in Buenos Aires. T. WEIL, *supra* note 2, at 11; Hunt, Argentina, in LATIN AMERICA AND THE CARIBBEAN: A HANDBOOK 7 (C. Véliz ed. 1968). Hence, provincial legislative independence was considered chaotic and contrary to tradition. See J.A. GONZÁLEZ CALDERON, 3 DERECHO CONSTITUCIONAL ARGENTINA 164-68 (1923).

11. "The Argentine Congress has the power to enact civil, commercial, penal and mining codes." ARGEN. CONST. art. 64(11) (amended 1860).

12. ARGEN. CONST. art. 67(11), *supra* note 5.

13. *Id.* art. 108.

14. The provincial tribunals' interpretation of the civil, commercial, penal, and mining codes shall not authorize *recurso de apelación* (writ of appeal) to the Argentine Supreme Court even though the codes are national laws by virtue of article 67(11) of the Argentine Constitution. 48 L.N. art. 15 (1863).

Constitution and the laws of the federal government. Article 100 specifically states the following:

The Supreme Court and the inferior federal tribunals of the nation have jurisdiction over and decide all cases dealing with matters governed by the Constitution and the laws of the Nation, with the exception provided by article 67(11); and by treaties with foreign nations; all suits affecting ambassadors, public ministers, and foreign consuls; with cases in admiralty and maritime jurisdiction; with cases to which the nation is a party; with cases between two or more provinces; between one province and citizens of another province; between citizens of different provinces; and between one province or its citizens against a foreign state or citizen.¹⁵

Although the Argentine Congress has the authority to enact the various codes, articles 104 and 105 protect the provincial governments from a usurpation of their authority. Article 104 states that the provinces retain all powers not delegated by the Constitution to the federal government.¹⁶ An unduly broad reading of article 67(11), however, may undermine provincial authority. Unfortunately, Argentine Supreme Court decisions have not adequately reconciled these interests. In fact, the Court has struck down provincial legislation even though it did not clearly conflict with a federal code.¹⁷ In so doing, the Court has overemphasized notably ambiguous and vague provisions. The following cases illustrate this point.

B. Scope of Article 67(11) of the Argentine Constitution

In *Abate v. Municipalidad de la Ciudad de Tucumán*,¹⁸ the plaintiff sued a municipality to recover three unpaid promissory notes drawn by a corporation.¹⁹ Judgment was recovered against

15. ARGEN. CONST. art. 100.

16. The provinces retain all powers not delegated by the Constitution to the Federal Government and those expressly reserved by special covenants at the time of their incorporation. *Id.* art. 104. Among these powers is the right to elect governors, legislators, and provincial officials without intervention from the federal government. *Id.* art. 105.

17. For a discussion of selected decisions of the Argentine Supreme Court, see *infra* notes 18-80 and accompanying text.

18. Judgment of May 28, 1892, *Corta Suprema de Justicia de la Nación*, C.J.N., Argen., 48 Fallos de la Corte Suprema de Justicia de la Nación [Fallos] 195.

19. *Id.* at 195. The Argentine Civil Code classifies municipalities as *personas jurídicas* (legal entities). *Código Civil*. [Cód. Civ.] arts. 32 & 33. *Personas jurídicas* may be sued in civil actions and judgments may be levied upon their property. *Cód. Civ.* art. 42.

the municipality,²⁰ and the lower court issued a writ of execution for the judgment, which was not satisfied.²¹ The plaintiff obtained an order for attachment of a municipal market²² and the municipality demurred, asserting that provincial law prohibited attachment of municipal property assigned to a public service.²³ The federal district court held that the market could be properly attached despite the provincial law.²⁴ The Argentine Supreme Court reversed, holding that article 42 of the Civil Code allowed the attachment of the municipality's *dominio privado* (private property), but not its *dominio público* (public property).²⁵ The Court noted that the *dominio público* of *personas jurídicas*, such as streets, parks, roads, and establishments destined to public offices and those destined to general communal service, are "out of commerce" and inalienable according to article 2336 of the Civil Code.²⁶ The Court also ruled that judges are not empowered to change the public destiny of *dominio público* belonging to *personas jurídicas* or to order the attachment and execution of such property.²⁷

20. 48 Fallos at 196.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 199. The district court based its opinion on Judgment of Aug. 7, 1883, C.J.N., 25 Fallos 432. In that case, the Supreme Court had summarily affirmed a federal court decision authorizing the attachment of a municipal market. Unlike the *Abate* case, the provincial law did not prohibit the attachment of municipal property. Interestingly, the Supreme Court in *Abate* made no mention of this decision.

25. 48 Fallos at 200-201. The Civil Code classifies federal and provincial property as public or private property of the federal government or of the individual provinces. Cód. Civ. art. 2339. Ports, bays, banks of navigable rivers, navigable lakes, streets, roads, canals, and so forth are considered federal or provincial public property. *Id.* art. 2340. Lands not owned, mines, property of individuals dying without heirs, fortifications, and vessels belonging to the enemy are examples of federal or provincial private property. *Id.* art. 2342. The purpose of the Civil Code's classification is not entirely clear. For instance, article 2341 states that the people have the right to use and enjoy the public property of the federal government or of the provinces, but that use and enjoyment are subject to the provisions of the Code, federal law, and local ordinances. No other specific provision addresses the same question as to the private property of the federal government or the provinces. In addition, the Code does not specifically provide for the national government or the provinces to alienate their public or private property. In Roman, Spanish, and ancient French law, public property was also inalienable. See M. MARIENHOFF, TRATADO DEL DOMINIO PÚBLICO 223-24 (1960).

26. 48 Fallos at 200-01. Items are "in commerce" if their alienation is not expressly prohibited or subject to public authorization. Cód. Civ. art. 2336. Article 2336 is conceptually related to article 953 of the Civil Code, which establishes that things not in commerce cannot be made the object of any *acto jurídico* (legal transaction) (e.g. a contract, a mortgage, an attachment).

27. 48 Fallos at 200. The Court noted that article 66 of the law creating the municipality of the federal capital of Buenos Aires declares the same principle, establishing that mu-

The *Abate* opinion is plagued with faulty assumptions and omissions. Unfortunately, this is characteristic of the majority of the Argentine Supreme Court opinions on the subject. For example, the Court did not explain why *dominio público*, as classified in the Civil Code by article 2340,²⁸ is within the scope of article 2336's²⁹ implicit prohibition of alienation and, by implication, cannot be attached and eventually sold, while private municipal property is not. If the Court reasoned that the *dominio público* mentioned in article 2340 is property subject to public authorization, as article 2336 sets forth, it is difficult to reach an opposite conclusion in cases involving private provincial or municipal property.

Furthermore, the Supreme Court did not even refer to article 2344³⁰ of the Civil Code, which, if taken together with articles 2336 and 2340,³¹ would seem to resolve the issue. Article 2344 states that municipal property is property that the federal government or the provinces have vested in the municipalities and is alienable in the manner and form prescribed by special laws.³² The *Abate* Court might have reasoned that the province of Tucumán had excluded the revenues and other *dominio público* of the municipality from the reach of creditors, thus leaving open the possibility of attaching other municipal property not necessarily public. This exclusion, however, could be valid to the extent that a municipal market is *dominio público* and, therefore, would fall within the general terms of articles 2340 and 2336 of the Civil Code.³³

In *Shary v. Municipalidad del Rosario*,³⁴ the Supreme Court declared article 42 of the Civil Code, which establishes the plaintiff's right to sue and enforce a judgment against a municipality, incompatible with article 132 of the Constitution of the province of Santa Fé and article 14 of the law creating the municipality of Rosario.³⁵ Both articles prohibited the attachment of municipal revenues and property, but neither expressly distinguished between public and private municipal property. The Supreme Court re-

municipal revenues and property effected to the general service of the municipality are immune from attachment and execution. *Id.* at 200-201.

28. *See supra* note 25.

29. *See supra* note 26.

30. Cód. Civ. art. 2344.

31. *Supra* notes 25-26.

32. Cód. Civ. art. 2344.

33. *Supra* notes 25-26.

34. Judgment of Mar. 3, 1906, C.J.N., 103 Fallos 373.

35. *Id.* at 387-88.

versed and remanded the case for the lower court to consider whether there were any other grounds on which the judgment could be upheld apart from the general language of the provincial law.³⁶

*Rossi y Rocca v. Municipalidad de Tucumán*³⁷ dealt with a possible conflict between article 196 of the Tucumán municipalities law and provisions of the Civil Code.³⁸ The Supreme Court of Tucumán denied the plaintiff's post-judgment request for attachment of municipal property on the ground that article 196 of the provincial municipality law only permitted attachment of one-fourth of the communal revenues.³⁹ The opinion is not clear as to whether the request for attachment was for municipal money or other property (e.g. real estate). Nonetheless, the Argentine Supreme Court reversed.⁴⁰ The Court recognized that all laws regulating private relations among the inhabitants of the Argentine Republic fall within the purview of civil and commercial legislation and therefore fall within congressional power to enact civil and commercial codes.⁴¹

According to article 33(3) of the Civil Code, municipalities are *personas jurídicas* and, in that capacity, may be sued and the resulting judgments against them enforced.⁴² Article 196 of the municipalities law involved in *Rossi y Rocca*, protected the municipality of Tucumán from actions by its creditors and regulated the form and method by which creditors could exercise their rights.⁴³ Thus, it appeared that article 196 of the provincial municipalities law infringed upon the subject matter of the Civil Code, an area exclusively reserved to the Argentine Congress. Consequently, the decree by which the attachment was denied could not be validly grounded on article 196 of the provincial municipalities law.⁴⁴

In *Rossi y Rocca*, the Argentine Supreme Court took a step toward "clarifying matters." In ruling that the province had legislated on a subject exclusively reserved to the Argentine Congress, the Court assumed that the regulation of the form and method by

36. *Id.* at 388-89.

37. Judgment of Aug. 6, 1926, C.J.N., 147 Fallos 29.

38. *Id.* at 30.

39. *Id.* at 31.

40. *Id.* at 36.

41. *Id.* at 35.

42. See *supra* note 19.

43. 147 Fallos at 30.

44. *Id.* at 35.

which creditors must judicially exercise and enforce their rights falls within the exclusive domain of the Civil Code.⁴⁵ This assumption, however, is controvertible. The provincial municipal law seemed more procedural than substantive. In addition, the Supreme Court assumed that the Argentine Congress, by enacting article 42 of the Civil Code,⁴⁶ preempted the field relating to the enforcement process. This point is also debatable. There is no question that the federal Congress can regulate the substantive areas of civil law. Articles 67(11)⁴⁷ and 108⁴⁸ of the Argentine Constitution vest the federal legislature with the responsibility and authority to enact the codes. Article 42 of the Civil Code, however, is notoriously vague. One can plausibly argue that under article 42 a judgment against a municipality is enforceable. However, one must give that reading practical effect by determining the scope of enforcement.⁴⁹

Finally, the *Rossi y Rocca* Court,⁵⁰ as the *Abate* Court before it, did not mention article 2344, which establishes that municipal property is alienable in the manner and form prescribed by special laws.⁵¹ One could read article 2344 as an indication that some authority, other than the Civil Code, must provide for action against municipal property.⁵² The provincial law referred to in *Rossi y Rocca*⁵³ may very well be one of the special laws referred to in article 2344.

The *González v. Provincia de Santiago del Estero*⁵⁴ case is similar to *Rossi y Rocca*, except that the defendant was the province itself. The province of Santiago del Estero leased real estate

45. *Id.*

46. See Cód. Civ. art. 42, *supra* note 19.

47. *Supra* note 5.

48. *Supra* note 13 and accompanying text.

49. See, e.g., *Abate*, *supra* note 18. The *Abate* Court considered whether a provincial law could put a communal market out of the reach of creditors, notwithstanding the generic language of article 42 of the Civil Code on the enforceability of judgments against municipalities. In upholding the provincial law, the Court rested its decision upon an equally broad reading of article 2340 of the Civil Code, which declares that streets, squares, canals, bridges, and any other public works constructed for common utility and comfort are the *dominio público* of the province and are prohibited from being alienated according to article 2336 of the Civil Code. See *supra* note 29 and accompanying text.

50. 147 Fallos 29; see *supra* notes 37-45 and accompanying text.

51. *Supra* note 32 and accompanying text.

52. *Id.*

53. *Supra* note 37 and accompanying text.

54. Judgment of Dec. 3, 1930, C.J.N., 159 Fallos 326.

from González, and fell behind in its payments.⁵⁵ González obtained a favorable judgment, but the province refused to satisfy the award.⁵⁶ The district court dismissed González's motion to attach provincial property. The civil and commercial court of appeals of Santiago del Estero held that under article 5 of the Constitution of Santiago del Estero, a judgment ordering the province to pay a sum of money was unenforceable until six months after the date of judgment.⁵⁷ During that six-month period, the legislature was to establish the form and manner to honor the award.⁵⁸ The court added that article 5 of the provincial constitution did not affect the Civil Code as it was merely a procedural provision, wholly in accordance with the province's non-delegated powers.⁵⁹ Moreover, public policy dictated that there be a lapse of time before the judgment against the province should be enforced.⁶⁰

The court noted that the executive, as administrator of the province, needed to adjust its proceedings in order to match provincial budgetary constraints.⁶¹ In addition, under the provincial constitution, the executive was obliged to enforce provincial laws and to use its resources according to the respective laws.⁶² The court noted that as González was aware of article 5 of the provincial constitution and did not file a timely challenge to it, he had submitted himself to its authority.⁶³

The Supreme Court, citing articles 67(11), 31, and 108 of the Argentine Constitution, struck down article 5 of the provincial constitution.⁶⁴ The Court held that the six-month period between judgment and enforcement established under that article, affected the structure of the Civil Code, which does not create a special benefit in favor of the *personas jurídicas* over which it legislates but, to the contrary, establishes equality between *personas jurídicas* and individuals.⁶⁵

The Supreme Court has applied the foregoing principles in tax

55. *Id.* at 331.

56. *Id.* at 329.

57. *Id.* at 329-30.

58. *Id.* at 330.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 330-31.

64. *Id.* at 334.

65. *Id.* at 335; see also *Cód. Civ.* arts. 41 & 42.

refund cases. For example, in *Compañía Sudamericana de Servicios Públicos v. Provincia de Santa Fé*,⁶⁶ the Supreme Court struck down a local statute which required the complainant to file a request for an administrative refund proceeding prior to filing the judicial complaint.⁶⁷ The Court held that the provincial law implied the establishment of a respite in favor of the province and, therefore, constituted a regulation of the form and method by which creditors exercise their rights.⁶⁸ In three other cases, among others, *Nidera Argentina, S.A. v. Provincia de Entre Ríos*,⁶⁹ *Organización Coordinadora Argentina v. Provincia de Tucumán*,⁷⁰ and *SADE, S.A. v. Provincia de Santa Cruz*,⁷¹ the Supreme Court struck down several local statutes of limitations for tax refund actions because they granted less time to file an action than provided for under the Civil Code.⁷²

With this overview in mind, one can conclude that the Supreme Court is unwilling to recognize meaningful provincial legislative power in areas concerning the interplay between articles 67(11), 104, and 105 of the Argentine Constitution.⁷³ In most of the cases mentioned above,⁷⁴ the Court apparently followed a centralist approach. In other words, when it was unclear as to whether local law was preempted, the Court ruled against the local legislation. Indeed, with regard to certain areas, article 67(11) of the Argentine Constitution centralizes legislative power in the federal Congress.⁷⁵ The Argentine Constitution, however, also provides that all powers not delegated to the federal government are reserved to the provinces,⁷⁶ including the authority to establish local

66. Judgment of May 29, 1940, C.J.N., 186 Fallos 531.

67. *Id.* at 535-36.

68. *Id.* at 534-35.

69. Judgment of Dec. 4, 1972, C.J.N., 284 Fallos 319.

70. Judgment of Aug. 28, 1979, C.J.N., 301 Fallos 709.

71. Judgment of Feb. 23, 1982, C.J.N., 304 Fallos 163.

72. The Civil Code does not have a statute of limitations dealing specifically with tax refund actions. The Supreme Court has struck down local limitations periods for tax refund actions on the ground that such legislation affects the structure of the civil, commercial, and penal codes. See Judgment of Sept. 1, 1967, C.J.N., 268 Fallos 491; Judgment of May 19, 1967, C.J.N., 267 Fallos 468; Judgment of Apr. 26, 1967, C.J.N., 267 Fallos 363; Judgment of Aug. 18, 1966, C.J.N., 265 Fallos 211; Judgment of Oct. 23, 1929, C.J.N., 156 Fallos 20; Judgment of June 23, 1967, C.J.N., 149 Fallos 54.

73. ARGEN. CONST. arts. 67(11), 104, & 105; see *supra* notes 5, 15-19 and accompanying text.

74. *Supra* notes 18-80 and accompanying text.

75. *Supra* note 5 and accompanying text.

76. ARGEN. CONST. art. 104.

institutions,⁷⁷ and the authority to interpret and apply the federal codes.⁷⁸ The inherent conflict between these constitutional provisions has compelled the Court to use a balancing test in cases that do not clearly intrude upon congressional power to enact the codes or the provisions of the codes themselves. If the Court continues along the same doctrinal lines, the reservation of power provision of article 104⁷⁹ will become meaningless. Based upon the Supreme Court decisions analyzed above,⁸⁰ however, it is hard to reach a contrary conclusion with regard to the scope of provincial power to legislate.

C. *The Federal Judiciary*

The organization of the judicial power under the Argentine Constitution is strikingly similar to that of the U.S. Constitution.⁸¹ Article 94 of the Argentine Constitution vests the judicial power in one Supreme Court and inferior tribunals.⁸² Articles 100 and 101 establish federal court jurisdiction.⁸³

The strong similarities between article 100 of the Argentine Constitution and article III, section 2, of the U.S. Constitution are not accidental. One of the reasons the Argentine Congress amended the Constitution of 1853 in 1860, was to track the U.S. Constitution, which at the time, was generally acknowledged as the best ideological framework carried to fruition. Without the U.S. framework, the Argentine Constitution would have had many meaningless sections.⁸⁴

77. *Id.* art. 105.

78. *Id.* art. 67(11).

79. *Id.* art. 104.

80. *Supra* notes 18-80 and accompanying text.

81. Article III, § 2 of the U.S. Constitution addresses the scope of federal jurisdiction. U.S. CONST. art. III, § 2.

82. Article 94 of the Argentine Constitution provides that the judicial power of the nation shall be vested in one Supreme Court of Justice and in such other inferior tribunals as Congress may establish in the territory of the nation. ARGEN. CONST. art. 94.

83. *Id.* art. 100; *see supra* text accompanying note 15. Article 101 of the Argentine Constitution provides the following:

In these cases the Supreme Court shall exercise appellate jurisdiction, according to the rules and exceptions as the Congress shall make; but in all matters concerning ambassadors, ministers, and foreign consuls, and those in which any province shall be a party, the Court shall exercise original and exclusive jurisdiction.

Id. art. 101. The original jurisdiction of the Court, unlike the U.S. Supreme Court, is exclusive.

84. E. RAVIGNANI, 4 ASAMBLEAS CONSTITUYENTES ARGENTINA 769 (1937); *see also* Pe-

Domingo F. Sarmiento, a 19th century liberal politician and former President of Argentina,⁸⁵ commented on the background of the 1853 Constitution. He noted that an Argentine court may refer to U.S. cases, cite U.S. constitutional scholars as authority, and adopt the interpretation of the U.S. Constitution as the genuine interpretation of the Argentine Constitution.⁸⁶

Juan B. Alberdi, the father of the Argentine Constitution of 1853,⁸⁷ agreed in part with Sarmiento on the relevance of U.S. constitutional law. Alberdi, however, believed that Sarmiento incorrectly emphasized the importance of the use of U.S. sources for interpreting the Argentine Constitution. He based this on the fact that there are articles of the Argentine Constitution which have no counterpart or are not rooted in the U.S. Constitution.⁸⁸

The Supreme Court of Argentina has looked upon U.S. constitutional case law and discussions relating to article III of the U.S. Constitution when interpreting article 100 of the Argentine Constitution.⁸⁹ In fact, in one of its earliest decisions, *Gómez v. La Nación*,⁹⁰ the Supreme Court of Argentina stated that there was no basis to believe that the drafters of the Argentine Constitution had Spanish legislation in mind when drafting the Argentine Constitution. The court stated that it was evident that the Argentine framers sought to imitate the Constitution of the United States.⁹¹ Therefore, the Court looked to U.S. constitutional principles and case law in order to properly determine the scope of Argentine federal court jurisdiction.⁹²

tracchi, *supra* note 1, at 710.

85. Gallo, *Argentina: Society and Politics, 1880-1916*, in 5 THE CAMBRIDGE HISTORY OF LATIN AMERICA 359-61 (L. Bethell ed. 1986).

86. J.B. ALBERDI, 10 OBRAS SELECTAS 357-58 (1920).

87. W. STOKES, LATIN AMERICAN POLITICS 458 (1959).

88. J.B. ALBERDI, *supra* note 86, at 358-59. For an article-by-article analysis of the sources of the Argentine Constitution, see Vanossi, *La Influencia de la Constitución de los Estados Unidos de Norteamérica en la Constitución de la República Argentina*, REV. JUR. SAN ISIDRO 73-178 (Dec. 1976).

89. See Judgment of June 3, 1904, C.J.N., 99 Fallos 383, 409; Judgment of July 27, 1889, C.J.N., 36 Fallos 394, 398; Judgment of Dec. 3, 1881, C.J.N., 23 Fallos 726; Judgment of May 2, 1874, C.J.N., 15 Fallos 7, 14; Judgment of Apr. 11, 1874, C.J.N., 14 Fallos 425.

90. Judgment of June 1, 1865, C.J.N., 2 Fallos 36.

91. *Id.* at 44.

92. *Id.* As to the importance and practicality of U.S. precedents and doctrine in Argentina, the Supreme Court stated in Judgment of Aug. 21, 1877, C.J.N., 19 Fallos 231, 236, that it shall use U.S. cases as precedents because Argentina has no specific constitutional provisions dealing with the issue. The Supreme Court cited *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821), and the authority of Kent, Jefferson, Story, Cushing, and Wilson. See also Judgment of July 3, 1897, C.J.N., 68 Fallos 227, 235, in which the Court noted that U.S.

D. Influence of U.S. Supreme Court Precedents over Argentine Jurisprudence

In construing constitutional provisions modeled after the U.S. Constitution, the Argentine Supreme Court has often considered U.S. constitutional precedent and the opinions of U.S. constitutional scholars.⁹³ In interpreting the Argentine Constitution, however, U.S. case law is considered merely persuasive and not binding authority.⁹⁴ For example, the Argentine Supreme Court has never explicitly adopted the U.S. legal doctrines relating to third party standing,⁹⁵ declaratory judgment,⁹⁶ ripeness, Pullman abstention and related abstentions, official immunity, and some other judicially-developed limitations on the jurisdiction of federal courts.⁹⁷

precedents and doctrine shall serve in Argentina. In the Judgment of Aug. 6, 1937, C.J.N., 178 Fallos 308, 327, the Court pointed out that it had followed previously the practical wisdom of the U.S. Supreme Court. The Court cited *American Steel & Wire Co. v. Speed*, 192 U.S. 500, 522 (1904); *Woodroff v. Paran*, 75 U.S. (8 Wall.) 123 (1868); and *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827).

93. *Supra* note 89-92. See also Judgment of Dec. 11, 1990, C.J.N., — Fallos — (Petracci, J., *en disidencia*), citing Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988); Judgment of Mar. 12, 1987, C.J.N., 310 Fallos 508, citing L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 636-40, 644 (1978); Judgment of Apr. 21, 1941, C.J.N., 189 Fallos 308, citing R. ROBERTSON & F. KIRKHAM, *JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES* 470 (1936). See also Judgment of May 31, 1984, C.J.N., 306 Fallos 516, in which the Argentine Supreme Court used U.S. Supreme Court precedents to interpret the Commerce Clause, article 67(12) of the Argentine Constitution (*e.g.*, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)).

94. Many clauses of the U.S. Constitution served as models for the Argentine Constitution. However, based on this fact alone, one should not conclude that the Argentine Supreme Court is bound by U.S. Constitutional case law. In fact, the author has found no Argentine High Court decision granting precedential authority to a U.S. case or reversing a lower court for departing from U.S. precedent.

95. Garay, *El "interès" para Pedir la Declaración de Inconstitucionalidad de las Normas y la Invocación del Derecho de Terceros*, 1989-D L.L. 822 (1989).

96. See Judgment of Aug. 20, 1985, C.J.N., 307 Fallos 1379, where for the first time, the Supreme Court admitted an action for declaratory judgment of unconstitutionality (citing *Aetna Life Ins. v. Haworth*, 300 U.S. 227 (1937)). Declaratory judgment actions were expressly authorized by article 322 of the National Civil and Commercial Procedure Code since 1967, but the Argentine Supreme Court invariably held that this provision was inapplicable in cases where the plaintiff alleged the unconstitutionality of a statute. For an illuminating discussion on this topic, see the Opinion of the *Procurador General* (Attorney General) 307 Fallos 1379, 1382 n.* (1985). The Office of the *Procurador General* was established by the Judiciary Act of 1862. 27 L.N. (1862). His opinion must be sought by the Supreme Court in every case where a statute is said to be repugnant to the Constitution. Nevertheless, his opinion is not binding on the Argentine Supreme Court.

97. The influence of U.S. constitutionalism depends on the degree to which the Argentine Supreme Court justices are aware of these judicially-developed doctrines. However, it is likely that U.S. constitutional developments are ignored by many, if not most, Argentine Supreme Court justices. Since 1944, scholarly Argentine works on U.S. constitutional law have been scarce. Quotations from U.S. cases and of commentators sporadically appear in

It can be argued that under the doctrine of original intent, the Argentine Supreme Court *should* follow U.S. Supreme Court precedent, at least in cases where the constitutional provision in question was modeled in accordance with the U.S. Constitution and where the use of U.S. precedent would be compatible with Argentine history.⁹⁸ Such an argument, however, necessarily raises difficult questions regarding the history of the Argentine Constitution. For instance, should U.S. precedent be circumscribed to those decisions rendered prior to 1860, when the Constitution of 1853 was significantly amended? More difficult questions are raised when considering the precedential value of U.S. decisions *within* the United States. For example, what path should the Argentine Supreme Court follow when the United States Supreme Court overrules its own prior decisions? What should be the role of concur-

Argentine Supreme Court decisions, depending upon the composition of the Supreme Court and its understanding of the English language. These quotes have reappeared, especially during the 1960s and since 1983. The Supreme Court of Argentina rarely cites living Argentine authors.

98. The interpretation of original intent is a thorny issue. Argentina never experienced a strong debate over original intent as the only legitimate standard for constitutional decision making. See e.g., R. BIELSA, *LA PROTECCIÓN CONSTITUCIONAL Y EL RECURSO EXTRAORDINARIO* 69-70 (1936). According to Tomás Jofré, Argentine Supreme Court decisions were never resisted due to their "prudence," a term which is neither descriptive nor sufficient to explain whether the Supreme Court departed from the framers' original plan for the Argentine Constitution. See Jofré, *Prólogo*, in F. ESPIL, *LA SUPREMA CORTE FEDERAL Y SU JURISDICCIÓN EXTRAORDINARIA* 9 (1915). In 1930, the Supreme Court and the judiciary lost an ideal opportunity to defend the constitutional text and the understanding of the framers of how it was to function. When the first *coup d'état* overthrew the constitutional government and imprisoned President Irigoyen, the Supreme Court issued an opinion by which it acknowledged the legitimacy of the *de facto* government. Judgement of Oct. 22, 1930, C.J.N., 158 Fallos 391. The Constitution expressly condemns acts such as sedition. ARGEN. CONST. art. 22. Part of the Court's decision to recognize the new government was the Government's public commitment to maintain the supremacy of the Constitution and the laws of the nation. *Acordada* of the Supreme Court Recognizing the National Government, Sept. 24, 1930, C.J.N., 158 Fallos 290. For an english translation of the *Acordada*, see K. KARST & K. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA* 194-95 (1975).

In 1858, Juan B. Alberdi warned:

Respect the elected President and just with this you will be powerful and invincible against all resistance to national organization; for respect for the President is no more than respect for the Constitution by virtue of which he was elected; [h]is respect for *discipline* and *subordination* that, in politics, as well as in the army, is key to strength and victory. . . . [A]s long as we keep stupidly in mind the belief, that *wise politics* and *revolution* are equivalent things even though it was true in 1810; as long as there are publicists who boast and claim to *know how to overturn ministers by cannon shots*; as long as people sincerely believe that a political conspirator is less despicable than a thief, Spanish America loses all hope to be worthy of international respect.

J.B. ALBERDI, *supra* note 86, at 251-52.

ring⁹⁹ and dissenting opinions of the United States Supreme Court justices in Argentine constitutional interpretation? Should Argentine law schools incorporate required courses on American constitutional law as part of their legal instruction? Should Argentine Supreme Court justices be expected to become experts in Argentine and American constitutional law? Should the federal government publish a Spanish translation of United States Supreme Court cases?¹⁰⁰ In answering these questions, it is important to start with an examination of the structure of the Argentine judiciary as established by the Argentine Constitution.

1. Subject Matter Jurisdiction

As previously mentioned, articles 100 and 101 of the Argentine Constitution are modeled after article III, section 2, of the United States Constitution.¹⁰¹ The problems associated with interpreting both constitutions are, therefore, analogous. As in the United States, federal courts in Argentina are tribunals of limited subject matter jurisdiction.¹⁰² Article 100 of the Constitution provides for federal judicial review over certain cases in which federal jurisdiction is lacking.¹⁰³ In addition, a court may, *sua sponte*, raise objections to subject matter jurisdiction.¹⁰⁴ Unlike in the United States Supreme Court, however, the Argentine Court has interpreted subject matter jurisdiction as exclusive.¹⁰⁵ Such exclusivity was the historical *raison d'être* of the 1860 amendment to article 67(11) of

99. For instance, in Judgment of Aug. 28, 1984, C.J.N., 306 Fallos 1125, 1130, the Supreme Court quoted Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 149 (1950) (Frankfurter, J., concurring).

100. During the first twenty-five years of Argentine constitutional jurisprudence, many books on U.S. constitutional law were translated to Spanish by express legislative command. See 55 L.N. (1863) (Story's *EXPOSICIÓN DE LA CONSTITUCIÓN DE LOS ESTADOS UNIDOS DEL NORTE*); 109 L.N. (1864) (material by Kent dealing with U.S. constitutional jurisprudence and government); 375 L.N. (1870) (works on federal law by Cushing, Pomeroy, Paschal, and Lieber); 380 L.N. (1870) (THE FEDERALIST, and Curtis's *HISTORIA DE LA CONSTITUCION DE LOS ESTADOS UNIDOS*). See also Egües, *Facultades del Congreso: Reflexiones sobre la Influencia Doctrinal Norteamericana*, in *ATRIBUCIONES DEL CONGRESO* 1 (1986).

101. See *supra* notes 15, 83-84 and accompanying text.

102. T. WEIL, *supra* note 2, at 189.

103. ARGEN. CONST. art. 100; see *supra* text accompanying note 15.

104. See 17.454 L.N. (1967), amended by 22.304 (1980) (Cód. PROC. CIV. Y COM. arts. 1 & 4). See also L. PALACIO, *MANUAL DE DERECHO PROCESAL CIVIL* 234 (1967). Identical principles govern federal jurisdiction in the United States. See FED. R. CIV. P. 12(h)(3); E. CHERMERINSKY, *FEDERAL JURISDICTION* 219-20 (1989).

105. See Judgment of Nov. 5, 1868, C.J.N., 6 Fallos 385; see also 48 L.N. art. 12 (1863).

the Constitution.¹⁰⁶ Furthermore, as will be noted below, federal subject matter jurisdiction is *improrrogable* (not extendable).¹⁰⁷

This interpretational difference is largely due to distinctive textual differences between the two constitutions. The Argentine Constitution states that the Supreme Court and the inferior tribunals shall "have jurisdiction over and decide all cases dealing with matters governed by the Constitution and the laws of the Nation."¹⁰⁸ This article is notably different from article III, section 2 of the U.S. Constitution, which refers to all cases "arising under the Constitution or the laws of the Nation."¹⁰⁹ It is therefore arguable that the Argentine provision is textually broader than the U.S. constitutional provision. For example, a case may not "arise" under the Argentine Constitution *per se* (e.g., the plaintiff's claim is based on federal law, rather than a specific constitutional provision); however, the case may still deal with, among other questions, matters governed by the Constitution to the extent that constitutional adjudication is required.¹¹⁰ However, the conclusion that article 100 of the Argentine Constitution is, as a practical matter, broader than article III, section 2 of the U.S. Constitution is erroneous.¹¹¹

There are other differences between the Argentine and U.S. judicial systems. For instance, unlike the United States Judiciary Act of 1789, the Argentine Judiciary Act of 1863 (Law No 48),¹¹² grants federal courts of first instance *original* and *exclusive* jurisdiction over cases *pecially* governed by the Constitution, laws enacted by Congress, and treaties with foreign nations.¹¹³ Bearing in

106. E. RARIGNANI, *supra* note 84, at 781-82, 933, 988, § 1052-53; G. BIDART CAMPOS, 1 EL DERECHO CONSTITUCIONAL DEL PODER, 372 (1967).

107. 48 L.N. art. 12 (1863).

108. ARGEN. CONST art. 100, *supra* note 15. See also text accompanying note 15.

109. U.S. CONST. art. III, § 2. See *supra* note 81.

110. Cf. Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal., 463 U.S. 1 (1983) (dealing with federal question jurisdiction under 28 U.S.C. § 1331), and Verlinden B.V. v. Central Bank of Nig., 461 U.S. 480 (1983) (discussing the *arising under* jurisdiction of article III, section 2 of the United States Constitution).

111. See *infra* text accompanying notes 116-131.

112. 48 L.N. (1863).

113. National sectional judges shall have original jurisdiction in the following cases: (1) Cases specially governed by the Constitution, the laws enacted by the Congress, and treaties with foreign nations. *Id.* art. 2(1) (1863). That jurisdiction is *exclusive*. *Id.* art. 12. The decision of a federal judge declining or affirming jurisdiction was appealable to the Supreme Court. *Id.* art. 6. Law No 4055 tacitly abrogated article 6 of Law No 48. In addition, Law No 4055 established the federal courts of appeal and made jurisdictional issues appealable to them. See 4055 L.N. art. 17(1) (1901); see also Judgment of Oct. 31, 1921, C.J.N., 135 Fallos

mind that Law No 48 was derived from the United States Judiciary Act of 1789, it is apparent that the differences in the Argentine corollary are original.¹¹⁴ Furthermore, the language of Law No 48 is unique when compared to the Argentine Constitution.¹¹⁵ Although, the drafters' drew the wording from the first paragraph of article 100 of the Argentine Constitution, article 2(1) of Law No 48 does not mention the term "all," and the phrase "dealing with matters" was replaced with the term "specially."¹¹⁶ As a result, the jurisdiction conferred by Law No 48 is quite different in scope from that articulated in article 100. At this juncture, we turn to judicial interpretations to clarify the scope of jurisdiction with regard to article 100 of the Argentine Constitution and article 2(1) of Law No 48.

2. Cases Specially Governed by the Argentine Constitution

There are many Argentine cases in which the plaintiff based his action upon the Constitution. The typical example is a tax refund action in which the plaintiff, after paying a tax under protest, challenges the constitutionality a local tax law.

These cases have raised two different but interrelated issues. The first issue arises with respect to the well-pleaded complaint rule,¹¹⁷ which requires the plaintiff to base the cause of action on federal law for purposes of subject matter jurisdiction.¹¹⁸ Second, the court must decide whether the nature of the refund action is based upon the Constitution or steeped in the Civil Code or provincial laws.¹¹⁹

An example illustrating the well-pleaded complaint rule is

22.

114. The U.S. Judiciary Act of 1789 did provide for general, original, and exclusive federal subject matter jurisdiction as did Law No 48. See HART, *infra* note 118, at 960-66; see also Judgment of Feb. 14, 1885, C.J.N., 27 Fallos 449; J. GONDRA, JURISDICCION FEDERAL 51, 471 & 485 n. 16 (1944).

115. ARGEN. CONST. art. 100; see *supra* text at note 21.

116. 48 L.N. art. 2(1) (1863).

117. See *infra* notes 120-131 and accompanying text.

118. See Cód. PROC. CIV. Y COM. art. 5 (jurisdiction is determined by the nature of the complaint alone and not by the defendant's defenses). See also *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908); P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 997-99 (3d ed. 1988) [hereinafter HART].

119. Cód. PROC. CIV. Y COM. art. 5. See *supra* note 118.

Botti v. del Corro,¹²⁰ in which the plaintiff sued in federal court to compel a provincial tax collector to refund taxes levied on wines the plaintiff introduced into the province of Mendoza.¹²¹ The plaintiff claimed that the provincial law was unconstitutional based on binding Supreme Court precedent.¹²² The defendant did not argue the constitutionality of the provincial law, but instead relied on the statute of limitations embodied in the Civil Code, claiming that the plaintiff did not file the complaint within the prescribed period of time.¹²³

The lower court held that the sole issue to be determined was whether the statute of limitations had expired, a question governed by the Civil Code and not by federal law.¹²⁴ The Supreme Court reversed, holding that the plaintiff's right of action was based on a constitutional provision.¹²⁵ Accordingly, the Court concluded that federal subject matter jurisdiction is determined by the nature of the complaint *per se* and not by the defendant's assent to the issues involved in the complaint.¹²⁶

The conclusion in *Botti* that the plaintiff's right to a refund is based on the Constitution and that therefore federal subject matter jurisdiction attaches cannot be reconciled with a textual reading of the Constitution. The Argentine Constitution does not explicitly address refund actions.¹²⁷ The Court's failure to explain its reasoning undermines the soundness of the decision.

With these precedents in mind, one might be tempted to con-

120. Judgment of Apr. 9, 1891, C.J.N., 43 Fallos 220.

121. *Id.* at 220. The Supreme Court did not specify which articles of the Constitution had been violated. Articles 9, 10, and 11 may be the provisions the Court had in mind.

122. *Id.*

123. *Id.* at 221.

124. *Id.* at 224.

125. *Id.* at 225-26.

126. *Id.* at 225-27. Similarly, in a prior refund case not cited in *Botti*, Judgment of May 3, 1865 (*Mendoza y Hno. v. Provincia de San Luis*), C.J.N., 1 Fallos 485, the Supreme Court had assumed that in such a suit, when the plaintiff attacks a provincial statute on constitutional grounds, his right is based on the Constitution and, consequently, federal subject matter jurisdiction follows. 1 Fallos at 497.

127. The issue addressed in *Botti*, whether the right to sue for a refund is itself a creation of constitutional law, came before the United States Supreme Court in *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931); and *Ward v. Love County*, 253 U.S. 17 (1920). Those cases invoked the fourteenth amendment and struck down state tax statutes as depriving the plaintiffs of due process. Similarly, in the recent case of *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco Dep't of Business Regulation of Fla.*, 110 S. Ct. 2238 (1990), the Court held that the Due Process Clause requires a state to afford taxpayers a meaningful opportunity to secure post-payment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional.

clude that in Argentina a refund action can be based on the Constitution. The *Botti* decision should be compared with *Pilkington Bros. Ltda. v. Nación Argentina*¹²⁸ and *García v. Provincia de Entre Ríos*,¹²⁹ where the Supreme Court held that the right to sue for a tax refund, on the ground that the tax collection is repugnant to the Constitution, is based on article 794 of the Civil Code. The Court rendered this ruling despite the fact that article 794 does not expressly refer to this kind of case¹³⁰ and in principle should apply to refund actions between private parties. This decision is completely at odds with *Botti* and its progeny.¹³¹ Nonetheless, until today, these two lines of cases have quietly coexisted.

3. Subject Matter Removal Cases

The Argentine Supreme Court's struggle with the principle of subject matter removal jurisdiction serves as an excellent example of how the Court has tended to construe Argentine federal law in accordance with the U.S. constitutional model. In 1863, the Argentine Congress authorized the general grant of subject matter removal jurisdiction from state to federal courts through Law No 50,¹³² and established original and exclusive jurisdiction of federal courts with articles 2(1) and 12 of Law No 48.¹³³ Although Law No 50 establishes the procedural requirements defendants must follow to remove a case to a federal court, the law does not expressly base removal jurisdiction upon original jurisdiction of the federal courts.¹³⁴ Law No 50 and later the Civil and Commercial Procedural Code¹³⁵ are silent as to whether removal to federal court is

128. Judgment of Nov. 29, 1940, C.J.N., 188 Fallos 381.

129. Judgment of July 20, 1942, C.J.N., 193 Fallos 231. This case, like the *Mendoza* case, was filed under the Court's original and exclusive jurisdiction.

130. A payment made by virtue of an obligation, the cause of which is contrary to the law or to public policy, is also made without cause, unless made in the fulfillment of an agreement, under which each of the parties was to obtain an unlawful advantage, in which case demand for its return cannot be made. Cód. Civ. art. 794.

131. 43 Fallos 220; see *supra* notes 120-127 and accompanying text.

132. 50 L.N. (1863). Note that Law No 50 has been abrogated by the law of civil and commercial procedure. 17.454 L.N. art. 820 (1967).

133. 48 L.N. arts. 2(1) & 12 (1863).

134. In the United States, removal jurisdiction has been expressly tied to original jurisdiction through the enactment of the Judiciary Act of March 3, 1887, 24 Stat. 552, and the Act of August 13, 1888, 25 Stat. 433. See HART, *supra* note 118, at 1052-53. The effect of tying removal to original jurisdiction has been that the defendants may only remove a case from state to federal court if the plaintiff's claim is based on federal law. A defendant may not remove based solely upon a federal defense to a state law claim. *Id.* at 1053 n.1.

135. Cód. Proc. Civ. y Com. arts. 7-13. In 1967, the Argentine Congress enacted the

based upon the original and exclusive jurisdiction of the federal courts over federal claims. Defendants, therefore, have traditionally relied on article 2(1) of Law No 48, establishing original jurisdiction of the federal courts, and on article 12, making jurisdiction exclusive.¹³⁶ The practical effect of Law No 50, when construed with Law No 48, is to tie removal jurisdiction to original jurisdiction. Therefore, a defendant may seek removal from state to federal court by showing that the plaintiff's cause of action is based on federal law, whereas a defendant may not seek removal if the defendant merely claims a federal defense to the plaintiff's state law claim.¹³⁷

In one of the first cases dealing with subject matter removal, *Banco de Londres y Río de la Plata del Rosario v. Rivadeneira*,¹³⁸ the Argentine Supreme Court, without mentioning any U.S. authority, relied on concepts similar to those of the well-pleaded complaint rule employed years later by the U.S. Supreme Court in *Tennessee v. Union and Planters' Bank*.¹³⁹

In *Rivadeneira*, the plaintiff sued Banco de Londres based upon a provincial statute.¹⁴⁰ The bank moved to remove the case to federal court for lack of subject matter jurisdiction of the provincial court, alleging that the statute on which the plaintiff relied was unconstitutional.¹⁴¹ The provincial court denied the motion and the bank appealed to the Supreme Court.¹⁴² In affirming the provincial court's ruling, the Supreme Court reasoned that although Law No 48 grants federal courts jurisdiction over cases

Civil and Commercial Procedural Code, which abrogated Law No 50.

136. 48 L.N. arts. 2(1) & 12 (1863).

137. This result is exactly the same as in the United States. See HART, *supra* note 118, at 1053 n.1.

138. Judgment of May 30, 1871, C.J.N., 10 Fallos 134.

139. 152 U.S. 454, 460-61, 464 (1893). This case generally stands for the proposition that jurisdiction depends solely upon the plaintiff's allegations and cannot rest on a federal defense raised by the defendant. See HART, *supra* note 118, at 995 n.1. See also Matasar & Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Ground Doctrine*, 86 COLUM. L. REV. 1291, 1332-33 (1986). This principle, propounded by the plaintiff in *Rivadeneira*, had been anticipated in an earlier criminal case, Judgment of Nov. 5, 1868, C.J.N., 6 Fallos 385 (jurisdiction attaches based upon the complaint in a civil action and the indictment in a criminal action). See also Judgment of May 8, 1984, C.J.N., 306 Fallos 368 (jurisdiction is determined by the nature of the complaint itself and not by the defendant's defenses); Judgment of Nov. 18, 1902, C.J.N., 96 Fallos 366; Judgment of Mar. 3, 1894, C.J.N., 55 Fallos 114; Cód. Proc. Civ. y COM. art. 5, *supra* note 118.

140. 10 Fallos at 135-36.

141. *Id.* at 136.

142. *Id.*

“specially” governed by the Constitution, that declaration does not equally embrace those cases in which a defendant asserts that a provincial statute is repugnant to the Constitution.¹⁴³ Consequently, in the latter kind of case, the Constitution is only indirectly, rather than “specially,” applicable because the question submitted to decision is directly governed by the provincial law.¹⁴⁴ The Court was concerned that defendants might be able to remove a case merely by alleging the unconstitutionality of the provincial law, thus causing the jurisdiction of the provincial tribunals to be usurped by the national tribunals, against the letter and spirit of the Constitution.¹⁴⁵ To avoid this result, the Court reasoned that as the Argentine Constitution is the supreme law of the nation, the provincial authorities are bound thereby, notwithstanding provincial constitutions or laws.¹⁴⁶ The Court further reasoned that provincial tribunals are enforcers of the national Constitution, and must therefore interpret and explain it, except when there has been an application for a *recurso extraordinario*¹⁴⁷ decision.¹⁴⁸ The Court therefore held that a defendant’s claim that a provincial law is unconstitutional is insufficient to deprive provincial tribunals of jurisdiction to entertain cases litigated by citizens of the same province and governed by provincial laws.¹⁴⁹

The *Rivadeneira* Court’s reasoning — that article 2(1) of Law No 48 requires the case to deal specially and directly with the Con-

143. *Id.* at 137.

144. *Id.*

145. *Id.* at 137-38.

146. *Id.* at 137. Article 31 of the Argentine Constitution provides:

The Constitution, the laws of the nation enacted by the Congress in pursuance thereof, and treaties with foreign powers are the supreme law of the nation; and the authorities in every province are bound thereby, notwithstanding any provision to the contrary which the provincial laws or constitutions may contain, excepting, for the province of Buenos Aires, the treaties ratified following the Pact of November 11, 1859.

ARGEN. CONST. art. 31.

147. *Recurso extraordinario* (extraordinary writ) is the equivalent of the original writ of error of section 25 of the U.S. Judiciary Act of 1789. Its characteristics are provided in articles 14-16 of Law No 48. In April 1990, the Congress passed Law No 23.774, making the Supreme Court’s appellate jurisdiction discretionary. 23.774 L.N. art. 2 (1990). For a discussion see Garay, *Comentario Sobre las Reformas al Recurso Extraordinario*, 1990-E L.L. 984 (1990); Sagüés, *El “Writ of Certiorari” Argentino*, 1990-C L.L. 717 (1990).

148. 10 Fallos at 137-38.

149. *Id.* at 138. Under article 100 of the Argentine Constitution, the defendant’s challenge to the constitutionality of the provincial statute in *Rivadeneira* would have been sufficient to allow removal to federal court. ARGEN. CONST. art. 100. However, as discussed above, the Argentine Congress did not adopt the language of article 100 when it enacted article 2(1) of Law No 48. 48 L.N. art. 2(1) (1863).

stitution — was further developed in *Casas v. Ferrocarril Central Argentino*.¹⁵⁰ In that case, the plaintiff sued a railroad company for property damage caused by the railroad company's locomotive,¹⁵¹ basing his claim on article 53 of Law No 531 which deals with the railroad company liability,¹⁵² and articles 901, 1068-69, and 1094-95 of the Civil Code, which address tort liability in general.¹⁵³ The plaintiff filed the lawsuit in a provincial court, and the railroad moved to remove the case to federal court on the ground that the right of action arose out of article 53 of Law No 531.¹⁵⁴

In sustaining federal court jurisdiction, the Argentine Supreme Court held that because the right asserted in the complaint was based on negligence attributed to employees or agents of a railroad company, and article 53 of the law of national railroads,¹⁵⁵ the case was specially governed by federal law and must therefore be submitted to federal jurisdiction.¹⁵⁶

The Court in *Casas* addressed a potential conflict between the Civil Code and federal law. Although article 53 of Law No 531 contains a *respondeat superior* clause, it does not mention the scope

150. Judgment of Dec. 2, 1890, C.J.N., 41 Fallos 260.

151. *Id.*

152. Railroad companies are directly liable for damage caused to third-persons by the fault or negligence of railroad employees performing their duties. 531 L.N. art. 53 (1872).

153. 41 Fallos at 260. Article 901 of the Argentine Civil Code, states that the consequences of an act that usually occurs in the natural and ordinary course of events are called immediate consequences, whereas the consequences resulting solely from the connection of an act with a different event are called mediate consequences. Mediate consequences which cannot be foreseen are called incidental consequences. C6b. Civ. art. 901. Under article 1068, damages occur whenever another person is caused an injury susceptible of pecuniary appraisal, either directly to the things belonging to him or in his possession, or indirectly on account of the damage done to his person or to his rights or powers. *Id.* art. 1068. Article 1069 of the Civil Code states that the term 'damage' comprises not only the loss actually sustained, but also the profits of which the person damaged may have been deprived by the unlawful act, and which in this Code are designated by the words 'losses' and 'interests.' *Id.* art. 1069. Article 1094 provides that when the offense consists of damages due to the destruction of a thing belonging to another, the indemnity shall consist of payment for the thing destroyed; when the destruction of the thing is partial, the indemnity shall consist of the difference between its present value and its original value. *Id.* art. 1094. Under article 1095, the right to recover indemnity for the damage caused by offenses against property is vested in the owner of the thing, in the person having the right of possession or the mere possession thereof, as the lessee, the bailee in commodatum, or the depository. *Id.* art. 1095.

154. 41 Fallos at 261.

155. Article 53 of Law No 531 delineates the manner by which these kind of corporations are held directly liable to third-persons for injuries caused by their employees' negligence.

156. 41 Fallos at 261.

of that liability.¹⁵⁷ The Argentine Civil Code, however, does discuss the scope.¹⁵⁸ In resolving this conflict, the Court stated that questions governed by the Civil Code must be decided by the federal judge "as incidental" to the federal law.¹⁵⁹ The Court reasoned that cases based upon constitutional or federal matters generally involve questions governed by the Civil Code.¹⁶⁰ The Court cautioned that if this was sufficient to deprive federal courts of jurisdiction, then their jurisdiction would be substantially impaired.¹⁶¹

It is important to note that the Supreme Court readily accepted the applicability of the Civil Code to the federal question involved in *Casas*.¹⁶² The few Code sections upon which the plaintiff relied, however, merely established the scope of liability in cases where someone negligently injures the property of another.¹⁶³ They do not specifically refer to damages caused by railroads in interstate commerce.¹⁶⁴ Article 53 of Law No 531 does not refer to the Civil Code as Article 52 of Law No 531 refers to the Commercial Code.¹⁶⁵ Just as U.S. courts would not assume that the common law of remedies should apply to a federal cause of action, the Argentine Supreme Court should not assume that the Civil Code automatically applies to federal law, even in a country with a civil law tradition.

When the federal law is silent as to the scope of liability, the application of a Civil Code provision is not necessary or obligatory. Although, federal courts *may* frame a liability issue according to

157. *Id.*

158. The Civil Code usually governs questions of civil liability of a substantive nature. The Code generally rules on the relations between private parties. Judgment of Oct. 23, 1929, C.J.N., 156 Fallos 20. However, Article 53 of Law No 531 is almost identical to article 1113 of the Civil Code. Article 1113 states that the obligation of a person who has caused a damage extends to the damage caused by the persons dependent upon him, or by the things of which he makes use, or which he has under his care. Cód. Civ. art. 1113.

159. 41 Fallos at 266.

160. *Id.*

161. *Id.* The strong similarity between this reasoning and the reasoning of the U.S. Supreme Court in *Osborn v. United States*, 22 U.S. (9 Wheat.) 819-20 (1824), is noteworthy. "If this were sufficient to withdraw a case from the jurisdiction of the federal Courts, almost every case, although involving the construction of a law, would be withdrawn; and a clause in the constitution . . . would be construed to mean almost nothing." At that time, 1890, the Argentine Supreme Court was already familiar with *Osborn*. See 1 Fallos at 488.

162. 41 Fallos at 266.

163. *Id.* at 265.

164. *Id.*

165. Article 52 of Law No 531 states that the companies' duties and liability as to porters shall be governed by the provisions of chapter 5, title 3, book 1 of the Commercial Code. 531 L.N. art. 52 (1872).

the Civil Code, they are not bound to do so under the Argentine Constitution or the laws of Congress.¹⁶⁶ Had the Argentine Supreme Court considered this possibility, perhaps the jurisdictional issue could have been disposed of more easily.

These subject matter removal cases illustrate the tendency of the Argentine Supreme Court to interpret federal law under the same principles used in the United States. For example, even though Law No 50 does not tie subject matter jurisdiction to original and exclusive jurisdiction,¹⁶⁷ as do the U.S. Judiciary Acts of March 3, 1887 and August 13, 1888,¹⁶⁸ the Argentine Supreme Court has construed Law No 50 and the Civil and Commercial Procedural Code together with Law No 48 to create that effect.¹⁶⁹ Moreover, the Court has required that cases deal specially and directly with federal law under article 2(1) of Law No 48,¹⁷⁰ similar to the well-pleaded complaint rule in the United States.¹⁷¹

III. STARE DECISIS AND THE BINDING EFFECT OF ARGENTINE SUPREME COURT PRECEDENTS

A. Introduction

The Argentine Supreme Court has yet to adopt a clear and definite position regarding the applicability of the Anglo-American doctrine of stare decisis to the Argentine constitutional context.¹⁷² Before examining this question, one must bear in mind that before and after its formal declaration of political independence from Spain in 1816,¹⁷³ Argentina's legal culture identified itself with the civil law tradition. Countries belonging to the civil law tradition tend to acknowledge *jurisprudencia* as a persuasive source of

166. For an interesting approach to legal reasoning in the interpretation of the Argentine Civil Code, see Carrió, *Judge Made Law Under a Civil Code*, 41 LA. L. REV. 993 (1981).
167. 50 L.N. (1863).

168. Judiciary Act of Mar. 3, 1887, 24 Stat. 552; Judiciary Act of Aug. 13, 1888, 25 Stat. 433.

169. See *supra* text accompanying notes 132-137.

170. 48 L.N. art. 2(1) (1863).

171. See *supra* note 115-119 and accompanying text.

172. Even though the question is not a new one, after *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), it seems difficult to foresee, at least for a foreign observer, what role stare decisis will play in U.S. constitutional law. See Justice Scalia's concurring opinion in *American Trucking Ass'ns, Inc. v. Smith*, 110 S.Ct. 2323, 2343-45 (1990) (Scalia, J., concurring) and Justice Kennedy's majority opinion in *Patterson v. McLean Credit Union*, 490 U.S. 164 (1989). But see Monaghan, *supra* note 102, at 748-670.

173. T. WEIL, *supra* note 2, at 14.

law.¹⁷⁴ In one sense, the multifaceted word *jurisprudencia* describes a continuum of similar cases decided alike.¹⁷⁵ However, even when *jurisprudencia* is used in this sense, prior decisions are considered persuasive but not binding.¹⁷⁶ They assist the judge in answering a legal problem, but the judge is not compelled to follow them.¹⁷⁷ A court is free to adopt a different position even with regard to its own precedents, as long as the decision or rationale is not incoherent or capricious.¹⁷⁸

In the civil law system, rules of law are embodied in pre-existing codes, statutes, or decrees, and courts are obliged to follow the laws, not prior decisions.¹⁷⁹ Notwithstanding this, purposefully or not, some courts in civil law countries, Argentina in particular, have followed a different path with regard to the weight of their own prior decisions.¹⁸⁰ It is not altogether clear whether these judges are attempting to adopt the principle of *stare decisis*.¹⁸¹ This practice was first used almost mechanically, using U.S. precedents as genuine interpretations of similar Argentine constitutional clauses. Once the Argentine Supreme Court decisions accumulated, they were then offered as authority for subsequent rulings.¹⁸²

The Argentine Constitution was modeled substantially after the U.S. Constitution¹⁸³ and, like the U.S. Constitution, was drafted in very broad terms.¹⁸⁴ The Argentine Constitution proclaims majestic and sweeping principles, much broader than provi-

174. For a discussion of the civil law system see J. MERRYMAN, *THE CIVIL LAW TRADITION* (2d ed. 1985).

175. C. NINO, *Introducción al Análisis del Derecho* 152 (2d ed. 1980).

176. *Id.*; J. HALL, *1 INSTITUTA DE LA JURISPRUDENCIA* xxvii (2d ed. 1905); J. Llambias, *1 TRATADO DE DERECHO CIVIL: PARTE GENERAL* 79-80 (10th ed.).

177. *Id.*

178. *Id.* See also Judgment of Apr. 8, 1959, C.J.N., 243 Fallos 259.

179. J. CUENTA RÚA, *FUENTES DEL DERECHO* 147, 168-70 (1982).

180. *Id.*

181. See *infra* part III(B); see also Judgment of Apr. 14, 1888, C.J.N., 33 Fallos 162, 199 (Zabaleria, J. *en disidencia*); Judgment of Dec. 6, 1881, C.J.N., 23 Fallos 726, 741 (Gorostiaga, J., *en disidencia*).

182. See *supra* notes 92-100 and accompanying text.

183. See *supra* part II(D).

184. See E. RAVIGNANI, *supra* note 84, at 811. Consider the following constitutional clauses: 1) "All inhabitants are equal under the law," ARGEN. CONST. art. 16; 2) "The property is inviolable," *id.* art. 17; 3) "The private action of men that in no way offend public order or morality, nor injure a third party, are reserved only to God and exempted from the authority of judges," *id.* art. 19; and 4) "The declarations, rights and guarantees enumerated in the Constitution shall not be construed as a denial of other rights and guarantees not enumerated, but based on the principle of the people's sovereignty and on the republican form of government," *id.* art. 33.

sions generally found in codes.¹⁸⁵ In the abstract, it is easier to authoritatively ground a decision in a code provision than in the Constitution.¹⁸⁶ A code generally contains not only substantive rules (*e.g.*, principles, rules, and general standards), but also remedies. In contrast, the United States Supreme Court in adjudicating the U.S. Constitution must frequently frame or infer the applicable substantive rule and, more often than not, the remedy. This type of constitutional interpretation is completely at odds with the civil law tradition, where the framing of rules and remedies falls within the legislative domain.¹⁸⁷

As in the United States, the Argentine Constitution is the supreme law of the land. Therefore, the Argentine Supreme Court may feel compelled to justify its constitutional decisions more convincingly than the lower courts.¹⁸⁸ In relying on precedent, the Argentine Supreme Court has sought a fair and consistent method of legitimately resolving constitutional disputes.¹⁸⁹ The question, however, still remains: just how much should precedent matter in a civil law country?¹⁹⁰

B. *The Supreme Court and Its Own Precedents*

The Argentine Supreme Court has expressly referred to *stare decisis* and its binding effect on several occasions. For instance, in *Baretta v. Provincia de Córdoba*¹⁹¹ an issue arose as to the applicability of a case decided while the *Baretta* case was pending.¹⁹² The Argentine Supreme Court stated that it would be extremely inconvenient for the community if precedents were not duly considered

185. See generally ARGEN. CONST.

186. This assertion, however, can be qualified. Codes also contain broad principles, rules or standards (*e.g.*, good faith, abuse of rights, due care) and judges frequently have to infer the substantive rules applicable to the case before them.

187. See G. CARRIÓ, RECURSO DE AMPARO Y TÉCNICA JUDICIAL 29 (2d. ed. 1987).

188. To paraphrase an often quoted sentence, in the U.S. as well as in Argentina, it is a Constitution that the Supreme Court is expounding. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

189. "If courts are viewed as unbound by precedent, and the law as no more than what the last court said, considerable efforts would be expended to get control of such an institution -- with judicial independence and public confidence greatly weakened." Monaghan, *supra* note 93, at 753.

190. For an analysis of the use and effects of precedent in the United States, see Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

191. Judgment of May 15, 1939, C.J.N., 183 Fallos 409.

192. *Id.* at 412-13.

and consequently followed.¹⁹³ Although it does not necessarily follow that precedent is decisive in every case, or that constitutional questions are subject to the principle of stare decisis without reservation, when the precedent being considered is "not mistaken or inconvenient" it should apply.¹⁹⁴

Because the *Baretta* Court did not adequately explain its reasoning, many questions were left unanswered. For instance, the Court did not explain what was meant by "mistaken and inconvenient" precedent? Nor did the Court establish any objective criteria for determining when precedent should be considered "mistaken or inconvenient." The Court's qualified notion of stare decisis, with its "mistaken and inconvenient" exception, is thus so broad that it can hardly be considered a principle of stare decisis at all.

Indeed, an examination of Argentine case law fails to disclose a line of precedent that expressly follows this approach. In cases where the Argentine Supreme Court has decided to move away from controlling precedents, the apparent ground for such deviation was either a new majority on the Court or changing conditions (e.g., legal, social, political, and economic).¹⁹⁵ A less plausible ground may have been the Court's lack of familiarity with the enormous quantity of prior decisions. Indeed, until April 1990, the jurisdiction of the Argentine Supreme Court was mandatory.¹⁹⁶ Remarkably, the Court decided an average of four thousand cases a year.¹⁹⁷

1. Political Instability and Stare Decisis in Argentina

Political instability was a constant feature of Argentine life for fifty-three years (1930-1983).¹⁹⁸ During that time, Argentina exper-

193. *Id.* at 413.

194. *Id.* In support of this proposition the Argentine Supreme Court cited W. WILLOUGHBY, 1 THE CONSTITUTIONAL LAW OF THE UNITED STATES 74 (2d ed. 1929).

195. See *infra* note 201; see also Judgment of Sept. 5, 1958, C.J.N., 241 Fallos 291; Judgment of Dec. 7 1934, C.J.N., 172 Fallos 21; Judgment of Aug. 21, 1922, C.J.N., 137 Fallos 47.

196. 23.774 L.N. (1990).

197. Lynch & Stanga, *Reformas en la Corte Suprema: Investigación Sobre las Condiciones de Trabajo, Cumplimiento de su Labor y Propuestas para su Reorganización* (Foro de Estudios sobre la Administración de Justicia Buenos Aires: Informe 1/1987).

198. See Early, *supra* note 2, at 254-58; see generally S. CALVERT & P. CALVERT, ARGENTINA: POLITICAL CULTURE AND INSTABILITY (1989); E. PALACIO, HISTORIA DE LA ARGENTINA (1988).

enced several *coups d'état*, and even a new Constitution which remained in force between 1949-1955.¹⁹⁹ Furthermore, on seven different occasions, the Supreme Court was either totally or partially restructured, which resulted in new majorities and halted jurisprudential continuity.²⁰⁰ These sudden changes put the legitimacy of Supreme Court precedent at issue. In other words, it was questioned whether a Supreme Court appointed by a duly elected government should be bound by precedents handed down by a Supreme Court appointed by a *de facto* government. Arguably, it would be absurd to expect that a constitutionally appointed Supreme Court would be obliged to follow prior decisions rendered by a non-constitutionally appointed predecessor. When a Supreme Court appointed by a *de facto* government interprets the Constitution, its spurious origin undermines its authority and its constitutional interpretations. Its decisions may at most be viewed as persuasive, but not binding.²⁰¹

199. This Constitution remained in force during Perón's government. R. FITZGIBBON, *supra* note 1, at 20-22.

200. J. MILLER, M.A. GELLI, & S. CAYUSO, 2 CONSTITUCIÓN Y PODER POLÍTICO: JURISPRUDENCIA DE LA CORTE SUPREMA Y TÉCNICAS PARA SU INTERPRETACIÓN 1156-57 (1987) [hereinafter 2 J. MILLER]. According to article 96 of the Argentine Constitution, the justices of the Supreme Court and of the lower courts shall hold office as long as they maintain their good conduct and shall receive for their services a compensation that shall be determined by law and that cannot be diminished in any way during their tenure. ARGEN. CONST. art. 96. Cf. U.S. CONST. art. III, § 1.

201. The Supreme Court of Argentina has overruled its own precedents many times regardless of the legitimacy of the Courts which handed down those precedents. The Court's practice differs from that of the United States in that it does not always expressly acknowledge that it is overruling a prior decision. Consequently, a state of confusion abounds. In Judgment of May 20, 1976, C.J.N., 294 Fallos 430, a completely new Supreme Court (appointed in 1976, after a *coup d'état*) expressly overruled a whole line of precedents as to the federal nature of social security laws. See Judgment of Aug. 8, 1974, C.J.N., 289 Fallos 185. In Judgment of May 17, 1977, C.J.N., 297 Fallos 500, the Supreme Court overruled Judgment of Oct. 18, 1973, C.J.N., 287 Fallos 79. In matters of exclusion of federal jurisdiction from certain kind of cases, a completely new Supreme Court, whose members were appointed in 1983 by the elected democratic government, expressly overruled prior cases in Judgment of Dec. 6, 1984, C.J.N., 306 Fallos 1872, 1880. In Judgment of April 8, 1986, C.J.N., 308 Fallos 490, the Court overruled a whole line of precedents as to the highest provincial courts' requirement to the effect of *recurso extraordinario*. In Judgment of Nov. 8, 1988, C.J.N., 1989-B L.L. 351 (1988), a 2-2-1 plurality opinion implicitly overruled the approach used in Judgment of Oct. 22, 1974, C.J.N., 290 Fallos 83. Argentine Court history confirms Justice Scalia's assertion that "[o]verrulings of precedent rarely occur without a change in the Court's personnel." *South Carolina v. Gathers*, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting). See also Garro, *Eficacia y Autoridad del Precedente Constitucional en América Latina: Las Lecciones del Derecho Comparado*, reprinted in 20 U. MIAMI INTER-AM. L. REV. 473 (1989); Díaz Cantón, *Cosa Juzgada Constitucional*, 57 E.D. 815, 823 (1975). The Argentine history of *coups d'état* is generally accompanied by the removal of the members of the Supreme Court and the appointment of new justices. So it was in 1955,

2. Political Stability and Stare Decisis in Argentina

Despite these periods of instability, Argentina has also experienced periods of institutional stability.²⁰² Democracy and the concomitant changes it brings aside, the Court must still grapple with the binding effect of precedent.

In *Sejean v. Zaks de Sejean*,²⁰³ a three-two majority of the Supreme Court declared article 64 of Law No 2393²⁰⁴ regulating civil marriage and prohibiting remarriage by divorced persons unconstitutional.²⁰⁵ At the same time, the Argentine Congress was considering a bill aimed at abrogating the subsequent marriage prohibition. When the bill passed and the judgment was rendered, both were generally celebrated, despite criticism from a few commentators.

Would it be possible for the Court to overrule that decision? Professor Bidart Campos argues that although the Supreme Court followed *Sejean* in subsequent cases, the *Sejean* case is *very recent* and has not established a following.²⁰⁶ Recalling the doctrine of *jurisprudencia*,²⁰⁷ it is evident that Bidart Campos is cognizant of the civil law tradition regarding *jurisprudencia constante* (continuum of prior cases).²⁰⁸ This continuum represents a stable and settled rule. Although Bidart's argument may be understandable if applied to civil and commercial cases, where the various panels of the same appellate court²⁰⁹ may have different, and even contradictory, interpretations about the same question of law, it is hardly justifiable when used in reference to Supreme Court decisions. As a

1966, and 1976. See 2 J. MILLER, *supra* note 200. Each return to democracy results in the removal (or resignation) of the preceding justices and the appointment of new ones. This institutional instability contributed to the practice of overruling, but, generally speaking, was not as ominous or perverse as it could have been. On the other hand, unlike the United States, Argentina never witnessed a radical intellectual shift like the one taking place now on the U.S. Supreme Court. Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 44-45 (1989).

202. "General José Uriburu's coup of September 1930, bloodless though it was, marked Argentina's sharpest turn from democracy since independence with parallels to that a century before." Hunt, *supra* note 10, at 15.

203. Judgment of Nov. 27, 1986, C.J.N., 308 Fallos 2268.

204. 2393 L.N. art. 64 (1888).

205. 308 Fallos at 2287.

206. See Garro, *supra* note 201, at 484.

207. See *supra* notes 173-80 and accompanying text.

208. *Id.*

209. Lavié, *Argentine*, in I-A INT'L ENCYCLOPEDIA COMP. L. A-35 (1972) (courts of appeal are generally divided into *salas* (panels) with three members each).

general principle, once the Argentine Supreme Court has decided a case, both its holding and its *ratio decidendi* should be applied to subsequent cases. Furthermore, unlike a court of appeals, the Supreme Court is not divided into panels; rather, the Constitution vests the judicial power in *one* Supreme Court²¹⁰ consisting of nine *ministros* (justices)).²¹¹

The uncertainty underlying Bidart Campos' statement may also be rooted in the three-two margin that decided *Sejean*. The majority's narrow margin of victory arguably leads one to conclude that the minority opinion may be worthy of consideration. Argentine law implicitly authorizes a Justice to dissent.²¹² Often, today's dissent becomes tomorrow's majority opinion.²¹³ If, however, the Court is to strictly follow *stare decisis*, what becomes the function of dissent?

Arguably, if *stare decisis* is rigidly followed, dissenting becomes useless. Under this scenario, if one combines the binding effect of precedent with the maxim that cases are decided by a collective body according to majority rule, the would-be dissenter is duty-bound to follow the majority view, notwithstanding his own opinion. Thus, if what counts for *stare decisis* purposes (and for the outcome of the case) is the majority's view, the above argument would require the minority to follow the majority's opinion.²¹⁴

This argument is virtually impossible to maintain.²¹⁵ First, the Argentine legal order authorizes a Justice to dissent.²¹⁶ Second, this argument would require a would-be dissenting Justice to replace his will for majority reason, obliging him to support something in which he does not believe. Reasoned decision-making is an

210. ARGEN. CONST. art. 94.

211. 27 L.N. art. 6 (1862). Technically, Argentina's national justice system includes the Supreme Court and the *Procurador General*. *Id.* Law No 23.774, enacted by the new Peronist administration, increased the number of Supreme Court justices from five to nine. 27.774 L.N. art. 1 (1990).

212. In cases where the constitutionality of a statute is at issue, the Court's decision must be by an absolute majority of the members of the Court and, in case of disagreement, by a majority of opinions. 1285 L.N. art. 23 (1958). *But cf.* 27 L.N. art. 9 (1862) (Supreme Court decisions must be rendered by the vote of the absolute majority).

213. Judgment of Sept. 22, 1887, C.J.N., 32 Fallos 120, 137, 142 (de la Torre & Ibagüen, J.J., *en disidencia*); Judgment of Aug. 1, 1885, C.J.N., 28 Fallos 406, 409 (Frias, J., *en disidencia*). Justice Frías was the lone dissenter in *Acevedo*, but, along with two new justices, he ended up in the *Sojo* majority.

214. *See supra* notes 212-13 and accompanying text.

215. However, it is not difficult to imagine a system of judicial review under which unanimity of the Court would be necessary to make declarations of unconstitutionality.

216. *See supra* note 212 and accompanying text.

indispensable and cherished value of the judicial process in general and constitutional adjudication in particular. Although dissenting opinions partially reflect this value, their role should be kept in proper perspective and judges should strive to achieve agreement.²¹⁷

One must also consider that strict adherence to *stare decisis* can lead to inconsistencies in the Court's constitutional adjudication. If a decision is rendered by a narrow majority, a subsequent case involving similar factual and legal grounds may yield the addition of the "swing vote." There are, however, ramifications that follow from this sort of ideological conversion. For example, scholars would question such a change, particularly if it occurred close to the first case and without any obvious factors to justify it. How would the legal community perceive the Court's inconsistency regarding the rule of law? Certainly, if precedent is to mean anything, predictability should have a bearing on constitutional adjudication. After all, as former Chief Justice Marshall of the U.S. Supreme Court reminds us, the Constitution is "the fundamental and paramount law of the nation."²¹⁸ For this reason, any theory about the binding effect of precedent must address the institutional role of majority and dissenting (and even concurring) opinions in constitutional adjudication.

A strict view of *stare decisis* would seem to posit that constitutional interpretation is immutable, but such an argument is misplaced.²¹⁹ Experience and constantly evolving societal attitudes are two extra-constitutional factors that are vital to any serious attempt at constitutional adjudication. The Argentine Constitution was meant to govern a dynamic society — and must be flexible to adapt to the various *crises* of human affairs.²²⁰ A consideration of these two extra-constitutional factors in today's Argentine life would lead one to conclude that *Sejean* should not be overruled.

217. As Professor Monaghan puts it, "[c]ollective thought is more than an academic abstraction about the nature of a court . . . it [is] an intrinsic aspect of the 'Supreme Court' established by [article 94 of the Argentine Constitution]." He goes on to state that, "[t]o say that each member of that Court takes an oath to support the Constitution as he sees it, not as others see it, does not detract from this point." Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 23 (1979) (footnote omitted).

218. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

219. Professor Harry W. Jones has noted that the doctrine of precedent "is not what a [legal] philosopher would call a categorical imperative but a rule of imperfect obligation." Jones, *Dyson Distinguished Lecture: Precedent and Policy in Constitutional Law*, 4 PACE L. REV. 11, 24 (1983).

220. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat) 316, 415 (1819).

That case reflects not only Argentine society's expectations as seen through the Court's eyes, but also the principles put into effect thereafter by Congress. *Sejean* simply does not have, in Professor Monaghan's words, "some palpable adverse consequences beyond its existence."²²¹

A look at Argentina's recent past reveals a country in chaos. The period between 1930 and 1983 was tainted with pathological breaks of the constitutional order, overt and covert unfulfillment of the law, official authoritarianism, pervasive economic decline, and endemic stagflation.²²² Thematically, those years were filled with irreconcilable disagreement, mainly because Argentine society was unable to respect a system suffering from such problems. Even military governments, which are always backed by at least part of the society,²²³ were overthrown by their own followers. Argentina needs a profound change, and part of this change must consist of attaining stability, fairness, predictability, and efficiency, values which are curiously, yet commonly, attributed to precedent. Practically speaking, it would be absurd to expect Supreme Court rulings to act as the vanguard for positive change in Argentine society. Nevertheless, as one of the three branches of government, the Court can, and does, make a difference.

C. Vertical Reach of Precedent

As suggested above, the horizontal reach of *stare decisis* has been limited by the effect of dissenting opinions.²²⁴ Yet the vertical reach of the doctrine of *stare decisis* is generally more far-reaching.²²⁵ As a general principle of American jurisprudence, when the Supreme Court decides a U.S. constitutional question, its holding binds every lower court, state or federal, addressing the same constitutional issue. In Argentina, on the other hand, this principle is not yet settled. Historically, two trends have developed.

In *Videla v. García Aguilera*,²²⁶ an early decision involving the binding effect of Supreme Court judgments on inferior courts, the Supreme Court seemed to endorse *stare decisis* by summarily af-

221. Monaghan, *supra* note 93, at 758.

222. See Early, *supra* note 2; S. CALVERT & P. CALVERT, *supra* note 198.

223. S. CALVERT & P. CALVERT, *supra* note 198, at 268.

224. *Supra* notes 216-218 and accompanying text.

225. Schauer, *supra* note 190, at 576; H. JONES, J. KERNOCHAN, & A. MURPHY, LEGAL METHOD: CASES AND MATERIALS 5 (1980).

226. Judgment of Apr. 9, 1870, C.J.N., 9 Fallos 53.

firming the lower court's decision.²²⁷ The federal judge in that case stated in *obiter dictum* that federal courts must adjust their doctrine and decisions to those rendered by the Supreme Court in analogous cases.²²⁸ The *Videla* Court's stance in many ways resembles the U.S. Supreme Court practice of summary affirmance.²²⁹ In cases like *Videla*, the Court's judgment is generally extremely brief: "In accordance with the grounds stated therein, the judgment of . . . is affirmed," or language to that effect. This brevity inevitably raises problems of interpretation, for it is not clear whether the Supreme Court approves the whole opinion, some parts of it, or just the holding of the case. In addition, the distinction between holding, *dictum*, and *ratio decidendi* is difficult to recognize when the Court affirms a decision *por sus fundamentos* (by its foundation). Professor Néstor Sagüé's analysis of *Videla* assumes that by affirming the grounds supporting a case under review, the Supreme Court of Argentina affirms the whole judgment.²³⁰ First, Sagüés notes that the Supreme Court accepted the federal judge's statement about the binding effect of Supreme Court decisions because it affirmed the appealed judgment pursuant to the grounds stated in the judgment.²³¹ However, the same author warns the reader of the ambiguity and uncertainty that un-

227. *Id.* at 55.

228. *Id.* at 54.

229. On summary affirmances in the U.S. see generally R. STERN, E. GRESSMAN, & S. SHAPIRO, *SUPREME COURT PRACTICE* 295-96 (6th ed. 1986); for a discussion of the precedential value of summary dispositions see Simpson, *Turning Over the Reins: The Abolition of the Mandatory Appellate Jurisdiction of the Supreme Court*, 6 HASTINGS CONST. L.Q. 297, 320-28 (1978).

230. N. SAGÜÉS, 1 RECURSO EXTRAORDINARIO 160 (1984). The Supreme Court of Argentina adopted this view in Judgment of July 4, 1985, C.J.N., 307 Fallos 1094. Bielsa, a strong opponent to the U.S. casuistic approach, adhered to the undifferentiated approach. R. BELSA, *supra* note 98, at 16, 286-87. *But see* Judgment of May 30, 1871, C.J.N., 10 Fallos 134, 139, in which the Supreme Court set aside an argument posited by the lower court, because it was not dispositive of the case. In Judgment of Sept. 22, 1887, C.J.N., 32 Fallos 120, the majority dismissed an original habeas corpus writ for lack of jurisdiction pursuant to article 20 of Law No 48. This decision runs counter to three prior cases decided on the merits: Judgment of Aug. 1, 1885, C.J.N., 28 Fallos 406; Judgment of Aug. 21, 1877, C.J.N., 19 Fallos 231; Judgment of Sept. 22, 1870, C.J.N., 9 Fallos 382. Nevertheless, the Supreme Court distinguished these three cases on the grounds that they had not dealt with the scope and constitutionality of article 20 of Law No 48. *See also* Judgment of Sept. 13, 1984, C.J.N., 306 Fallos 1363, in which the Supreme Court explained the holding of the Judgment of Mar. 17, 1885, C.J.N., 28 Fallos 78. The *Palacios* Court had affirmed the lower court's opinion according to the grounds stated in that opinion. *Cf. Hagans v. Lavine*, 415 U.S. 528, 532 n.5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.").

231. N. SAGÜÉS, *supra* note 230, at 160.

derlie that expression, and correctly states that such an expression does not clarify whether the Court accepted all or part of the reasons mentioned by the federal judge (there were three).²³² Unfortunately, Sagüés ends his analysis here and reverts to his original, undifferentiated approach.²³³

In *Pastorino v. Ronillon*,²³⁴ the Supreme Court, again under the guise of the same laconic reference, affirmed a federal judge's decision which stated that the precedents established by the Supreme Court impose a "moral" obligation on inferior courts.²³⁵ However, Supreme Court decisions do not "legally" oblige inferior courts unless the Supreme Court is reversing the lower court.²³⁶ Thereafter, in *Cerámica San Lorenzo*,²³⁷ the Court held that a lower court decision which departs from precedent, without providing new grounds which would justify the overruling of the precedent, lacks an adequate foundation and must therefore be reversed.²³⁸ On one level, this decision is contradictory. The Supreme Court cannot hold that lower courts have no *real* legal obligation to follow Supreme Court precedent, while simultaneously holding that a lower court which departs from Supreme Court precedent must furnish novel grounds for disregarding it, or else the Supreme Court will reverse. If a court must provide new grounds to justify its departure from Supreme Court precedent, there can be no better reason than by supporting that obligation with *some* kind of binding precedent.

Additionally, the Supreme Court's conclusion was reached tortuously and thus needs some explanation. In supporting the *Cerámica San Lorenzo* decision,²³⁹ the Supreme Court cited three cases, *Pastorino*,²⁴⁰ *Santín v. Impuestos Internos*,²⁴¹ and *Pereyra Iraola v. Provincia de Córdoba*.²⁴² Both *Pastorino*, which calls for a moral obligation to follow precedent,²⁴³ and *Santín*, which accepts

232. *Id.* at 161.

233. *Id.* at 170.

234. Judgment of June 23, 1883, C.J.N., 25 Fallos 364.

235. *Id.* at 368.

236. *Id.*

237. Judgment of July 4, 1985, C.J.N., 307 Fallos 1094.

238. *Id.* at 1096-97.

239. *Id.* at 1097.

240. 25 Fallos at 364.

241. Judgment of Oct. 6, 1948, C.J.N., 212 Fallos 51.

242. Judgment of Oct. 15, 1948, C.J.N., 212 Fallos 160.

243. 25 Fallos at 368.

a departure based on new and justifiable controverting grounds,²⁴⁴ admit a relative binding effect of Supreme Court precedents. The latter case, *Pereyra Iraola*, stresses that discarding Supreme Court precedents will damage constitutional order.²⁴⁵ Briefly stated, *Pastorino* and *Santín* go further than *Pereyra Iraola* with regard to the binding effect of precedent but fall short of providing precedent with a clear institutional authority.

Furthermore, the established rule is misleading. According to the Court in *Cerámica San Lorenzo*, the rebellious inferior court has to provide "new grounds" which justify the overruling of precedent.²⁴⁶ This notion not only undermines the weight of precedent, but also perverts the principles that precedential theory seeks to promote.

D. *The Demise of Precedent*

In *Sergio L. B. Pulcini y Oscar A. Dobra*,²⁴⁷ a criminal case, a federal appellate court, pursuant to Law No 20.771²⁴⁸ had convicted the appellants for possession of narcotics.²⁴⁹ The defendants appealed to the Supreme Court, invoking the Court's authority under *Gustavo M. Basterrica [sic] y Alejandro C. Capalbo*.²⁵⁰ In *Basterrica*, the Court by a three-two majority opinion had declared Law No 20.771 unconstitutional as long as it criminalized the possession of drugs for personal consumption.²⁵¹ In *Pulcini y Dobra*, the Supreme Court, however, dismissed the case for want of jurisdiction and let the convictions stand in direct opposition to the *Basterrica* decision.²⁵²

The Court recited the principles announced in *Cerámica*.²⁵³ Because the Supreme Court is the final judicial authority in Argentina, the Court reasoned, inferior tribunals are duty-bound to follow its decisions.²⁵⁴ Nonetheless, the Court inexplicably concluded

244. 212 Fallos at 59.

245. *Id.* at 160.

246. 307 Fallos at 1096-97.

247. Judgment of Oct. 26, 1989, C.J.N., 1990-B L.L. 421 (1990).

248. 20.771 L.N. art. 6 (1974).

249. 1990-B L.L. at 421.

250. Judgment of Aug. 29, 1986, C.J.N., 308 Fallos 1392. The Supreme Court recently overruled *Basterrica* in Judgment of Dec. 11, 1990, C.J.N., ___ Fallos ___, a 7-2 decision.

251. 308 Fallos at 1420.

252. 1990-B L.L. at 421.

253. *Id.*

254. *Id.*

that this obligation was not cast in stone, because inferior courts may ignore precedent as long as the lower court provides proper arguments to deviate from the precedent.²⁵⁵

The judicial gloss quickly gives way upon careful scrutiny. The Court has handicapped the doctrine of *stare decisis*. If an inferior court can unabashedly question a Supreme Court decision, the idea of binding precedent becomes academic. Any rational person knows that there are usually two sides to an argument, especially legal issues which are controvertible. New arguments and support are easy to articulate. Hence, the new grounds standard is unworkable in the realm of precedent. In spite of its practical shortfalls, lower courts use the new grounds standard to decide cases contrary to established precedent. The new grounds standard effectively destroys the finality of authority vested in the Supreme Court. Not surprisingly, the Supreme Court overruled *Basterrica*, only four years after it had handed down that case.²⁵⁶

1. The Final Interpreter of the Constitution

From its inception, the Argentine Supreme Court declared itself the final interpreter of the Constitution.²⁵⁷ Nevertheless, the Court has given out mixed signals on that score. For example, in *Juan R. Di Mascio*,²⁵⁸ the Supreme Court said that its role as final interpreter must be understood with reference not only to the unreviewable nature of its decisions, but also to the finality of those decisions, as they are rendered after both parties have exhausted all judicial avenues.²⁵⁹

As *Di Mascio* illustrates, the Supreme Court puts more emphasis on procedural rather than substantive matters. Today, the Supreme Court is the ultimate court to which one can appeal, and its decisions are therefore final and unreviewable.²⁶⁰ It is crucial to the judicial system that lower courts give due deference to constitutional decisions rendered by the Supreme Court in its capacity as final interpreter of the Constitution.

255. *Id.*

256. Judgment of Dec. 11, 1990, C.J.N., — Fallos — (1990).

257. 1 Fallos 340.

258. Judgment of Dec. 1, 1988, C.J.N., 1989-B L.L. 417 (1989).

259. *Id.* at 422.

260. See Judgment of Aug. 8, 1872, C.J.N., 12 Fallos 135 (questioning the *res judicata* effect of the Supreme Court decision rendered in the same case one year before, on the grounds that the decision was mistaken).

The Argentine Supreme Court was aware of the finality issue as discussed in *Mendoza y Hno.*²⁶¹ The province of San Luis had argued that in Argentina, like in the United States, a province could not be originally sued in the Supreme Court by a citizen of another state.²⁶² However, the Court pointed out that in *Chisholm v. Georgia*,²⁶³ the United States Supreme Court had affirmed its original jurisdiction in a similar situation.²⁶⁴ The Argentine Court also noted that in *Chisholm*, the U.S. Supreme Court proclaimed itself the final interpreter of the U.S. Constitution and that to withdraw this type of case from the U.S. Court's jurisdiction would necessitate an amendment to the U.S. Constitution.²⁶⁵ In contrast, the Argentine Constitution of 1853-1860 does not have a provision similar to the eleventh amendment of the U.S. Constitution. The Argentine Supreme Court emphasized the importance of the eleventh amendment not only because the Argentine Constitution did not adopt it, but also because that amendment was recognized as being crucial to the U.S. Supreme Court's adherence to precedent in subsequent cases.²⁶⁶ This characteristic is perhaps the most important enabler for the Argentine Supreme Court to act as the final interpreter of the Argentine Constitution.

The Court's working doctrine as to the unreviewable nature of the case at bar and to the prospective scope of the rule embodied in *Di Mascio* is complicated. In fact, if one were unaware of the Court's working doctrine, one would probably confuse the doctrine of *res judicata* with the final nature of the Court's decision-making.

The Supreme Court's role as final interpreter can be understood as having tremendous effect, whether or not *stare decisis* is given formal recognition. If we view the Supreme Court's role as final interpreter in light of article 31 of the Argentine Constitution,²⁶⁷ the inescapable conclusion is that inferior courts are bound by Supreme Court precedents.

261. 1 Fallos at 495-96.

262. *Id.* at 486.

263. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

264. 1 Fallos at 496.

265. *Id.*

266. *Id.*

267. Article 31 of the Argentine Constitution provides that the Constitution, the laws of the nation enacted by the Congress in pursuance thereof, and treaties with foreign powers are the supreme law of the nation; and the authorities in every province are bound thereby, notwithstanding any provision to the contrary which the provincial laws or constitutions may contain, excepting for the province of Buenos Aires, the treaties ratified following the Pact of November 11, 1859. ARGEN. CONST. art. 31.

When the Supreme Court decides a case and establishes a constitutional rule, principle, or standard, the Court is giving a *final* and *ultimate* interpretation of the Constitution not only for that case, but also for subsequent cases. If every authority, national or provincial, is governed by the Constitution, then every inferior court is bound by the constitutional rule, principle, or standard laid down by the Supreme Court in its capacity as the *final* interpreter of the Constitution.

Otherwise, if lower courts can question Supreme Court doctrine in similar cases to those already decided upon, as the Supreme Court authorized under *Cerámica*²⁶⁸ and *Pulcini y Dobra*,²⁶⁹ Supreme Court precedents interpreting the Constitution will always remain subject to review by inferior courts.

2. Inferior Court Departure From Precedents and the Procedural Scheme Resulting From *Pulcini y Dobra*

As discussed above, the Supreme Court in *Basterrica* had declared Law No 20.771 unconstitutional in 1986.²⁷⁰ In *Pulcini y Dobra*, however, the federal appellate court *upheld* the constitutionality of Law No 20.771 in October of 1989, accepting arguments not reported in the *Basterrica* case.²⁷¹ Nowhere in the *Pulcini y Dobra* opinion did the federal appellate court quote specific language from the cited cases.²⁷² Furthermore, the appellate court justified its upholding of the statute on the ground that these arguments had not been considered by the Supreme Court when deciding *Basterrica*.²⁷³ Although the appellants' lawyer argued for reversal based on the *Basterrica* holding, he did not expressly challenge the appellate court's novel arguments.²⁷⁴ Because of the appellants' omissions, the Supreme Court, in considering a *recurso de apelación*, decided not to address the constitutional arguments raised by the appellants and dismissed the *recurso de apelación*.²⁷⁵ The Court noted that the appellants' omissions prevented the Court from knowing the grounds upon which the appellants' claim was

268. 307 Fallos 1094.

269. 1990-B L.L. 421.

270. See *supra* text accompanying note 252.

271. 1990-B L.L. 421.

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

denied by the court of appeals.²⁷⁶

It is incredible that the Supreme Court has sanctioned such a harsh and burdensome a rule. A rule that under *Cerámica* imposed a minor burden on an inferior court, evolved into a retroactively applied burden on the appellants, who had to argue the validity of a Supreme Court decision.²⁷⁷

In any event, and apart from the absurd results which follow from the Court's decision, the appellants' omissions were justified. They relied on a Supreme Court precedent, a decision by the final interpreter of the Argentine Constitution.

Lastly, the procedural scheme framed by the Supreme Court is confusing. Under Argentine civil and criminal procedure, a unique precedent, or even a string of precedents, does not legally oblige either inferior courts of the same jurisdiction or panels of the same court of appeals. However, once a court of appeals sitting en banc establishes *the* legal interpretation ascribable to a code's rule, that doctrinal interpretation is binding on all the panels and inferior courts.²⁷⁸ All cases involving that rule must be decided alike. Procedural codes²⁷⁹ do not expressly allow departures from en banc decisions. Lower court judges are authorized to propound their own interpretations of the rule at issue,²⁸⁰ but they are bound to decide the case according to the principle of law established by the en banc decision.²⁸¹

The Supreme Court's apparent conception of its role under the above framework found in the codes leads one to the following conclusions: (1) Lower courts are always bound by en banc court of appeals decisions involving questions of ordinary or non-federal law; (2) however, lower court judges are not bound by Supreme Court precedents on questions of constitutional law. Thus, it appears that in constitutional matters, unlike in questions of ordinary laws, stability, certainty, predictability, fairness, and efficiency do not take priority. Argentines should take note that such a posture is too extravagant to maintain, at least when one intends

276. See *supra* notes 247-255.

277. In a recent case, Judgment of Apr. 15, 1986, C.J.N., 308 Fallos 552, the Supreme Court noted that certain cases may only have a prospective effect, not a retrospective one.

278. See Cód. PROC. CIV. Y COM. art. 303.

279. See Cód. PROC. CIV. Y COM. arts. 288-303.

280. See *id.* art. 303 (en banc decisions are binding on inferior judges, but the judges are authorized to express their personal opinions on the subject).

281. See Cód. PROC. CIV. Y COM. art. 303.

to take the Constitution and Supreme Court opinions seriously.

IV. CONCLUSION

This Article has discussed some aspects of Argentine federalism, the judiciary, and constitutional adjudication. For those unaware of the similarities between the Constitution of the United States and that of Argentina, it is hoped that this piece was informative and useful. Due to these similarities, many problems confronted daily by the Argentine Supreme Court are analogous to those faced by the United States Supreme Court. Indeed, the Argentine Court has often followed the U.S. Supreme Court in a variety of areas.

Compared with the U.S. Supreme Court, the binding force of Argentine Supreme Court decisions differs remarkably. One might be tempted to explain away this incongruity by the absence of *stare decisis* and the influence of the civil law tradition. If *stare decisis* is not controlling, it follows that Argentine Supreme Court opinions do not have binding force on inferior tribunals. This view presupposes that *stare decisis* is the only way to justify the binding force of decisions rendered by a constitutional Supreme Court. This is not necessarily so. The Argentine Constitution and Supreme Court decisions allow room to recognize the binding force of Supreme Court precedent. Such values as fairness, certainty, foreseeability, stability, and efficiency are not only promoted by precedent but also are fundamental to the notion of government subject to a written constitution and committed to the equal application of law.

One inevitably wonders why the Argentine Supreme Court does not adopt this point of view. There is no simple answer. Perhaps one reason is that as a result of a turbulent institutional past, many values and principles were lost — the original idea of a written Constitution, the Supreme Court as its final interpreter, the judicial branch as a power equal to the Congress and the Executive, and the Court as the independent head of the Judiciary. Otherwise, it is inconceivable that the Supreme Court should tolerate the inferior tribunals' disregard of High Court authority in their frequent departure from Supreme Court precedents. Such an intellectually "rebellious" attitude undermines the authority and the proper functioning of an hierarchal system. From a pragmatic point of view, it is undeniable that this posture promotes litigation

and threatens to swamp the already overloaded legal system. Furthermore, if the Supreme Court is going to allow inferior courts to depart from its constitutional rulings, why should administrative officials, the Executive, and the Legislature restrain themselves as well?

The upshot of all this is a chaotic, anarchical scheme, where anything goes. One of the most pernicious results of this wavering doctrine is the loss of respect for the rule of law. But the most dramatic effect of current constitutional jurisprudence in Argentina is the undermining of the very concept of government by a written constitution in conjunction with a final and independent interpreter — the Supreme Court.